Supreme Court, U.S.
FILED
MAR 18 2003
OFFICE OF THE CLERK

(3)

No. 02-1170

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC TEST AND ODELIA BRAUN,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

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6 pp

The Petition in this case presents two questions. The first question is whether *United States v. Gilmore*, 372 U.S. 39 (1963), should be overruled. The second question is whether federal circuit court rules (such as Ninth Circuit Rule 36-3) that deprive "unpublished" decisions of binding precedential effect and prohibit citation thereto are unconstitutional and exceed those courts' rule-making power. In his Brief in Opposition, Respondent Commissioner of Internal Revenue does not dispute that both questions raise important issues of federal law. Instead, Respondent argues (with respect to the first question) that there is no contention that *Gilmore* was incorrectly applied by the United States Tax Court or by the Court of Appeals for the Ninth Circuit in this case, and that there is no conflict among the circuits as to the applicability of *Gilmore* in this, the business-versus-personal expense, context. *See* Brief in Opposition at 6-7. With respect to the second question, Respondent argues only that the fact the court of appeals' decision in this case was not officially published had no effect on the outcome of that decision, and therefore that this second question is not properly presented. *See* Brief in Opposition at 7-8. Petitioners Eric Test and Odelia Braun respectfully disagree with Respondent's second argument, and respectfully submit that neither argument constitutes a sufficient basis for denying the Petition.

1. Petitioners agree that *Gilmore* might have been correctly applied by the lower courts in this case. Petitioners also agree that there does not appear to be any conflict among the circuit courts as to the applicability of *Gilmore* in this context; indeed, because those courts are bound by that precedent, there could be no such conflict. But Respondent fails to address the

many theoretical and practical problems associated with the *Gilmore* standard – problems that have caused the lower federal courts to evade its application in those situations where an application of *Gilmore* would be at odds with the whole of federal income tax law. *See* Petition at 8-12.

Respondent's argument also ignores the fact that the existence of controlling precedent does not, in and of itself, forever insulate questions of federal law from further consideration by this Court. Admittedly, the existence of apparently controlling precedent should give this Court some pause. But this Court previously has exhibited no unwillingness to reexamine prior precedents where such a reexamination is warranted. *See, e.g., Ring v. Arizona*, 536 U.S. 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). And like *Walton*, *Gilmore* at least warrants reexamination. The Petition should be granted as to question one so that the Court may consider whether *Gilmore* should be overruled or limited to those situations where its applicability would be appropriate.

2. It cannot be said with certainty that the court of appeals' determination that its decision in this case should not be officially published had no effect on the outcome of that decision. One of the primary (though often unstated) reasons behind rules limiting the precedential effect of "unpublished" decisions is a perception among many federal circuit court judges that they are not able to issue opinions of "publishable" quality in every case. As stated by the Court of Appeals for the Eighth Circuit:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential

> value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

Anastasoff v. United States, 223 F.3d 898, 904, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). *See also Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001) ("It goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them."). And if one has reason to question the quality of "unpublished" decisions themselves, might not one also have reason to question the analysis underlying those decisions?

More importantly, Respondent does not dispute that Petitioners properly followed the procedures established by the Court of Appeals for the Ninth Circuit for requesting that the court's decision in their case be officially published; that, in that request, Petitioners argued that the court of appeals' rules governing "unpublished" opinions were unconstitutional and exceeded that court's rule-making power; and that Petitioners' request for publication was denied. *See* Petition at 7. These facts alone establish

that Petitioners are entitled to seek review of that court's "unpublished" decision rules in this Court.

Petitioners also are entitled to challenge the propriety of the court of appeals' "unpublished" decision rules because a court of appeals' failure to designate its opinion as officially published impairs a party's ability to obtain further review of the underlying issues before this Court. *See, e.g.*, Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 571 n.141 (1997). Petitioners acknowledge that, on occasion, this Court has granted petitions for writ of certiorari in cases where the underlying decision was not officially published. But such occasions are relatively rare, and it is difficult to see how a lower court's decision could be in conflict with any other court's decision if that lower court decision is regarded as having no precedential value. *Cf.* Sup. Ct. R. 10 ("Considerations Governing Review on Certiorari"). Moreover, a decision by this Court in favor of Petitioners as to question two, followed by a remand to the court of appeals, presumedly would result (at a minimum) in the publication of that court's decision, at which time Petitioners presumedly could again petition this Court as to question one.

Finally, the issues raised by question two of the Petition are properly presented in this case because the propriety of the court of appeals' decision not to "publish" its decision in this case – and hence its decision to deprive that decision of precedential effect – is most appropriately (and perhaps may only be) determined here, on direct review. In other words, a future litigant who might wish to rely upon the court of appeals' decision in this case presumedly could not do

so by seeking some sort of collateral review of the initial decision not to publish. Thus, though such future persons might well be harmed by the court of appeals' failure to "publish" the decision in this case, they might not have any means of avoiding that harm other than that provided by this Court.

For these reasons, and for the reasons set forth in the Petition, the Petition should be granted.

Respectfully submitted.

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